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In the
Supreme Court of the United States

OCTOBER TERM, A. D., 1947

No. 233

RICE BROS., a partnership consisting of Charles R. Rice, Wm. J. Downey and John J. Donohue,

Petitioner,

vs.

E. H. BIRMINGHAM,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Pages

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statement of the Case 2

Argument 3

TABLE OF CASES

Davis v. Cleveland C. C. & St. L. Ry. Co., 217 U. S. 157 8

Equitable Life Assurance Soc. v. Brown, 187 U. S. 308 4

Home for Incurables v. City of New York, 187 U. S. 185, 47 Law Edition 117 4

International Milling Co. v. Columbia Transportation Co., 292 U. S. 511 8

Mason City Production Credit Association v. Sig Ellingson and Co., 205 Minn. 536, 386 N. W. 713; 308 U. S. 599; 60 Supreme Ct. 130; 84 Law Edition 501. Rehearing Denied, 308 U. S. 637; 60 Supreme Ct. 178; 84 Law Edition 529 ..... 2, 9

Mau v. Rice Bros., 216 Iowa 864, 249 N. W. 206 5

Natural Gas Co. v. Slattery, 302 U. S. 300, 306-307 8

New Orleans Waterworks Company v. Louisiana, 185 U. S. 336 4

Palmer v. Texas, 212 U. S. 118 8

State of Minnesota v. George Blasius, 290 U. S. pp. 1-12, 78 Law Edition, p. 130 8

Wardner, Bushnell & Glessner Co. v. Harris, 81 Iowa 453, 46 N. W. 859 5

STATUTES

Pages

Judicial Code, 28 U. S. C. A. 344, Section 237 (b) 2, 3

Packers & Stockyards Act, 42 Stat. 165, U. S. C. A., Title 7, Section 181 et seq. 3, 6

Rules and Regulations under Packers and Stockyards Act as amended effective February 6, 1945 6

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of Iowa (R. p. 44) is not yet officially reported, but appears in 26 N. W. 2nd, p. 39.

JURISDICTION

The judgment of the Supreme Court of Iowa was entered on February 11, 1947, and appellant's petition for rehearing in that Court was overruled on May 9,

1947. The petition for writ of certiorari was filed on July 30, 1947. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344).

QUESTION PRESENTED

The petitioner, a stockyards commission merchant at Sioux City, Iowa, and Sioux Falls, South Dakota, registered as a market agency under the Packers and Stockyards Act, sold cattle as agent for a party who gave the fictitious name of "John Brainman." The cattle had been obtained by said John Brainman from the respondent who was the owner of them by misstating his identity and by issuing a worthless check for the purchase price. The question presented is whether ~~a~~ petitioner is liable to respondent for conversion of the cattle. This same question has previously been before this Court in the case of *Mason City Production Credit Association vs. Sig Ellingson and Company,* 205 Minn. 536, 386 N. W. 713; 308 U. S. 599; 60 Supreme Ct. 130; 84 Law Edition 501, in which the petition for writ of certiorari was denied.

STATEMENT

The facts are not in dispute. They may be summarized as follows:

The petitioner is a partnership engaged in business as a livestock commission merchant in Sioux City, Iowa,

and Sioux Falls, South Dakota, and is registered as a market agency under the Packers and Stockyards Act, 1921, 42 Stat. U. S. C. A. Title 7, Section 181 et seq. (R. pp. 29-30). On June 6, 1945, petitioner received from a party who gave the name of John Brainman fifteen head of cattle and on the following day sold them at Sioux Falls, South Dakota, as agent for said John Brainman, and, after deducting their commission and the truck charges, delivered a check for the balance in the sum of $1,261.36 to said John Brainman. The cattle had been obtained on June 6, from the respondent, the owner of them, by the said John Brainman who represented himself to be a farmer from Dell Rapids, South Dakota (R. p. 20), upon delivering to the respondent a check drawn on the Northwestern Security Bank at Sioux Falls, South Dakota, in the sum of $1,405.25 (R. p. 12). Said check was later dishonored for the reason that no such person and no such account existed (R. p. 13). The respondent instituted suit for conversion of the cattle in the District Court of Iowa, for the Fourth Judicial District. At the close of the plaintiff's evidence, the Court directed a verdict in favor of the petitioner (R. p. 38), which judgment was reversed by the Supreme Court of Iowa, on February 11, 1947 (R. p. 44) and rehearing thereon was denied on May 9, 1947 (R. p. 138). Issuance of the writ of procedendo has been stayed pending application for writ of certiorari to this Court (R. p. 141).

ARGUMENT

Certiorari in this case could only be granted under that provision of Section 237 of the Judicial Code, U. S. C.

Title 28, Section 344 (b), which provides for the review of a state court decision

> "where any title, right or privilege or immunity is specifically set up or claimed * * * under the Constitution, or any * * * statute of * * * the United States."

Under the uniform decisions of this Court, it does not suffice that a federal question is formally raised in the state court proceedings; a federal question relied on must have substantial foundation or merit. See, e. g. *Equitable Life Assurance Soc. v. Brown,* 187 U. S. 308; *New Orleans Waterworks Company v. Louisiana,* 185 U. S. 336 and authorities cited.

"A reading of the decision of the Supreme Court of the State of Iowa will reveal that that Court found that aside from the defense of the Packers and Stockyards Act, the petitioner's defenses were without merit and its liability for conversion was established as a matter of law. It is apparent, therefore, that the decision of the Supreme Court of Iowa was made to rest in part upon some ground of local law sufficient enough in itself to sustain the judgment independently of any question of federal liability."

> *Home for Incurables v. City of New York,* 187 U. S. 155, 47 Law Edition 117.

The decision of the court below quite obviously involves only local law and presents no substantial federal question. The holding is merely that under the law of Iowa, an agent, factor or commission merchant who receives property from his principal, sells it under the latter's instructions and pays him the proceeds of the

sale, is guilty of conversion if his principal had no title thereto or right to sell the property. The decision is in accord with prior rulings of the Iowa Supreme Court. *Mau vs. Rice Bros.*, 216 Iowa 864, 249 N. W. 206; *Wardner, Bushnell & Glessner Co. vs. Harris*, 81 Iowa 453, 46 N. W. 859.

Much of the petitioner's brief is addressed simply to the proposition that the rule thus established is erroneous as a matter of local law. These assignments of error do not even formally raise a federal question and, consequently, provide no basis for issuance of the writ requested.

The remaining assignments of error are directed to the alleged error of the court below in applying this local rule to a market agency registered under the Packers and Stockyards Act. The petitioner's position is that the provisions of the Packers and Stockyards Act make it a "federal public utility" that as such it cannot under federal law be held liable for conversion in the circumstances here presented and that the contrary decision of the court below has the effect of burdening interstate commerce and depriving the petitioner of rights guaranteed to it under the Fourteenth Amendment (Assignment of Errors 1-6, Pet. pp. 9-23).

No useful purpose would be served by discussing the nomenclature issue tendered by petitioner in its assertion that the Packers and Stockyards Act makes it a "federal public utility." The Act simply requires stockyard commission merchants such as petitioner to register and imposes upon them as registered agencies certain duties and obligations. It contains no provision, expressed or

implied, which relieves registered agencies from their ordinary labilities under state law. To the contrary, Section 308 of the Act (42 Stat. 165, U. S. C. A. Title 7, Section 181 et seq.) which imposes liability on registered agencies for certain violations of the Act and provides that this liability may be enforced either by complaint to the Secretary of Agriculture or by suit in federal courts, expressly states that:

> "this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Since even in the case of specific violations of the Act, where a specific remedy is granted, state law remedies may nonetheless be availed of by the party wronged. It seems clear that such remedies may be availed of in cases which do not involve violation of the Act and for which the Act makes no provision.

The declared purpose of the Act is to provide uniformity through the country in the operation of the business of packers and stockyards and no reference is made therein of any intent of Congress to change or regulate the common law liability of market agencies. In determining whether a federal question is presented, the Court should not read into the Act something that is not essential to the operation of the statute. That Congress did not in its consideration of the foregoing section, while discussing the subject of common law liability, provide further specifically that market agencies be relieved from common law liability lends further strength to the argument that Congress did not so intend the Act as consti-

tuting a change as to common law liability. It is to be noted that the rules and regulations issued by the Secretary of Agriculture as authorized in said Act provide for payment of the proceeds of sales by market agencies to the owner. (R. p. 133 et seq.) In the instant case, the Act is fully operative without supplying an intent not found in the Act to relieve factors from common law liability. It was not to regulate the law of factors but to make all packers, stockyards and market agencies conform to certain regulations with relation to the operation of their businesses that the statute was enacted. The fact that the Packers and Stockyards Act does not preclude application of state law to a registered market agency makes unnecessary consideration of petitioner's contention that its liability is governed by a general federal law and that the federal law is contrary to the decision below.

Nor need detailed consideration be given to the argument that the rule of law established by the decisions below burdens interstate commerce. The respondent was the absolute owner of the cattle involved in this case and was free to deal with them as he liked. He could sell the cattle within the state or for shipment outside the state. He had placed them in pens and cared for them awaiting such disposition as he might see fit to make for his own profit. The cattle were not being held by the respondent for the purpose of promoting their safe or convenient transit. They were not in transit.

> "Where property has come to rest within a state, being held there at the pleasure of the owner for disposal or use so that he may dispose of it either within the state or for shipment elsewhere as his

interest dictates, it is deemed to be a part of the general mass of property within the state and thus subject to its taxing power."

State of Minnesota v. George Blasius, 290 U. S. pp. 1-12, 78 Law Edition, p. 130.

Davis v. Cleveland C. C. & St. L. Ry. Co., 217 U. S. 157 is decisive authority against petitioner's position. This Court there held that a state law authorizing an attachment of railroad cars used in interstate commerce did not contravene the Interstate Commerce Act or unconstitutionally obstruct commerce between the states. The Court stated (p. 177): "It is very certain that when Congress enacted the Interstate Commerce Law it did not intend to abrogate the attachment laws of the states." See also *Palmer v. Texas,* 212 U. S. 118; *International Milling Co. v. Columbia Transportation Co.,* 292 U. S. 511; *Natural Gas Co. v. Slattery,* 302 U. S. 300, 306-307. Obviously if an attachment under state law of facilities directly used in interstate commerce does not burden that commerce, no such burden can be found in the mere imposition of monetary liability for acts deemed tortious under state law.

Petitioner's assertion of a violation of equal protection clause of the Fourteenth Amendment is equally groundless. The rule of law established by the decision below is general in nature; nothing in the opinion indicates that it will not be applied to all persons either engaged in public utility operations or in purely private transactions. The petitioner's assertion that the decision deprives it of equal protection because the rule does not apply to common carriers is, therefore, without foundation in fact. Moreover, as the court below points out (R.

p. 52), there is a fundamental difference between a registered market agency and a common carrier. A carrier does not undertake to deal with or in any way affect the title of the property which it transports while the very business of a stockyards commission merchant, such as petitioner, is to act as agent in transferring title.

While petitioner contends that the decision violates the due process as well as the equal protection clause of the Fourteenth Amendment, it seems quite obvious that the petitioner has not been deprived of any property rights whatever, and that the alleged violation consisted merely of the fact that under the decision of the state court which it believes to be erroneous, it is required to pay damages.

The identical question involved herein was before this Court on petition for writ of certiorari from the Supreme Court fo the State of Minnesota in the case of *Mason City Production Credit Association vs. Sig Ellingson and Company,* supra, wherein the petition was denied, and later a motion for rehearing on said petition for writ of certiorari was filed and it likewise was denied by this Court, 308 U. S. 637; 60 Supreme Court 178; 84 Law Edition 529. The same counsel that appears for the petitioner in this case appeared for the petitioner in the Sig Ellingson case, and there, as here, urged the adoption of his "public utility" theory, as shown by the petition for writ of certiorari and brief in support thereof, filed in that case. While not expressly so stated, the only reason upon which a denial of a writ of certiorari in the Sig Ellingson case can be explained is that this Court found no federal question involved. The

same proposition is again presented in the instant case, and no substantial federal question being involved, the petition should, therefore, be denied.

Respectfully submitted,

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